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In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. _____.

THE NEW YORK, CHICAGO, AND ST. LOUIS RAILROAD COMPANY,

Petitioner,

vs.

NICK MASIGLOWA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI.

Your Petitioner, The New York, Chicago and St. Louis Railroad Company, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered by that Court in this cause on October 8, 1956.

OPINIONS BELOW.

The Court of Appeals did not render an opinion in this case. The opinion of the District Court is not officially reported. A copy of that opinion is found at page 11 of the Appendix.

JURISDICTION.

The judgment of the United States Court of Appeals for the Sixth Circuit, as to which review is sought herein, was dated and entered October 8, 1956. It is set forth in the Appendix hereto, page 13. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1)

QUESTION PRESENTED.

Whether, under the provisions of the Federal Employers' Liability Act, Title 45, United States Code, Sections 51 *et seq.*, a railroad is entitled to a directed verdict, in an action involving injury to its employee, acting in the course and scope of his employment, where the proximate cause of the accident which resulted in said injury was the negligence of the employee who failed to exercise ordinary care for his own safety, specifically in that he failed to utilize the facilities provided by the railroad and available at the time for the performance of his work.

STATUTE INVOLVED.

The statutory provision involved is Title 45, United States Code, Section 51:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of

interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

STATEMENT OF THE CASE.

Petitioner, The New York, Chicago and St. Louis Railroad Company, commonly referred as the Nickel Plate Road, is a railroad corporation engaged in the interstate transportation of passengers and freight. The jurisdiction of the District Court was invoked because the case arises under the Federal Employers' Liability Act, Title 45, United States Code, Section 51.

Respondent was employed by the petitioner as a car repairman's helper and had been engaged in that occupation since 1936. On March 14, 1950, the respondent was assisting car repairmen by bringing them material which they needed to complete their work (R. 10). The respondent was teamed with and assisted by another car repairman's helper by the name of Dean Hackenburg. These two employees were of equal rank insofar as their employment on the railroad was concerned. That is to say, neither Hackenburg nor the respondent had authority over each other (R. 36). On the date of the accident some of the men engaged in repairing railroad cars asked respondent and Hackenburg to bring them some lining which they needed to complete their job. This lining consisted of wooden boards which were about 18' in length, 5⅞" in width and ⅞" thick (R. 12). These pieces of lumber were secured together with string, each bundle containing approximately four sections of lining (R. 13). There was a conflict in the evidence as to how many bun-

dles of lining the respondent and Hackenburg attempted to carry just prior to the time respondent claims to have sustained his injury (R. 14, 51). At any rate, respondent and Hackenburg discussed the matter in an attempt to arrive at the best possible way to carry the lumber. As the result of this conversation they mutually agreed to lift some of the bundles of lining and to carry them manually over to the car repairmen (R. 14). Respondent was injured while carrying this lining.

The petitioner provided carts which were available to respondent and his assistant upon which the lumber could have been loaded and transported (R. 37). If the respondent and his assistant had used these carts there would have been no necessity to carry the bundles of lumber manually and no accident would have occurred.

Two factors are immediately apparent from this brief recital of the facts.

1. The plan adopted by respondent and Hackenburg for transporting the lumber to its destination was arrived at as the result of a mutual agreement by the two men and not as the result of any order from any of petitioner's supervisory personnel.

2. The petitioner had provided carts which were available at the time, the use of which would have obviated the necessity of carrying the lumber manually.

The petitioner moved for a directed verdict at the close of respondent's case which motion was overruled (R. 49). This motion was renewed at the conclusion of all of the evidence and was also overruled (R. 70).

Petitioner's motions for judgment notwithstanding the verdict and for a new trial were both overruled on September 17, 1955. A copy of the memorandum opinion of that ruling is set forth in the Appendix, p. 11.

The United States Court of Appeals for the Sixth Circuit affirmed the orders of the District Court. No opinion was rendered.

REASONS FOR GRANTING THE WRIT.

1. The decision of the Court of Appeals for the Sixth Circuit in the instant case is in conflict with the decisions of the Court of Appeals for the Seventh and Fifth Circuits. *Jackson v. Illinois Northern Railway,* 224 F. 2d 76 (1955); *Wadiak v. Illinois Central Railroad Company,* 208 F. 2d 925 of the Seventh Circuit and *Texas and Pacific Railway Company v. Thompson,* 232 F. 2d 313 (1956) of the Fifth Circuit. A Petition for a Writ of Certiorari was granted in *Texas and Pacific Railway Company v. Thompson, supra,* on October 22, 1956.

In *Jackson v. Illinois Northern Railway,* 224 F. 2d 76, the plaintiff was injured when he attempted to pick up with his hands a large frozen mass of sand instead of breaking it into smaller pieces so that he could shovel it. The Court of Appeals for the Seventh Circuit said that the failure of the plaintiff to make additional little pieces from the big piece he chose to move manually, hardly provides the basis for imposing liability on defendant even under the Federal Employers' Liability Act. The Court concluded the opinion as follows on page 78:

> "Those principles announced, explained, and applied by Judge Lindley in *Wadiak v. Illinois Central R. Co.,* 7 Cir., 1953, 208 F. 2d 925, are applicable to Jackson's appeal and support the trial judge's allowance of defendant's motion."

Wadiak v. Illinois Central R. Co., 208 F. 2d 925, is directly in conflict with the instant case. In that case, as in ours, the plaintiff and his assistant made the decision

as to how to perform their work. At page 928 of the opinion it is stated:

> "* * * The only permissible inference is that adequate equipment with which to do the work safely was available and that the workmen themselves made the decision to do the lifting by hand,—not any supervisory agent of defendant.
>
> "Nor did plaintiff's testimony include any proof that assistance could not have been had if it was determined advisable to move the barrel by hand. * * *"

The Trial Court in the instant case based its ruling on *Stone v. New York, Chicago and St. Louis Railroad Co.*, 344 U. S. 407 (Appendix p. 13). However, Judge Lindley in the *Wadiak* case, *supra*, distinguished the *Stone* case as follows at page 929 of the opinion:

> "* * * Plaintiff can find no comfort in this respect in *Stone v. New York, Chicago & St. Louis R. Co.*, 344 U. S. 407, 73 S. Ct. 358, 97 L. Ed. 441, where the person who ordered plaintiff 'to pull harder' was his superior, in charge of a section gang of which plaintiff was part. Furthermore, in that case there was substantial evidence of negligence in defendant's failure to furnish adequate man power and in the manner in which the 'straw boss' ordered the work done."

This distinction is equally applicable in our case.

Judge Martin in his opinion overruling petitioner's motion for final judgment and for a new trial conceded that the instant case was in conflict with the *Wadiak* case. (Appendix p. 13.)

> "The case mainly depended upon by defendant's astute attorney, *Wadiak v. Illinois Central R. Co.* (CA 7th), 208 F. 2d 925, rests upon its own special facts but inasfar as it gainsays, the viewpoint ex-

pressed in the opinion is not binding in this Circuit and will not be followed."

In *Texas & Pacific Railway Company v. Thompson*, 232 F. 2d 313, the decision of the Fifth Circuit Court is also directly in conflict with the instant case. (This Court granted a Petition for a Writ of Certiorari on October 22, 1956.) The *Thompson* case, *supra*, presents the same factual pattern. The employee was injured because, as she alleged, the railroad refused her request for additional help to handle an unusually large amount of mail. She presented no evidence to substantiate her claim and it was on this basis that the Fifth Circuit Court reversed the trial court. The Court stated at page 318:

> "* * * Her claim is based rather on the sum total of the operation of loading and unloading the mail on this particular day than on the weight of any particular sack of mail. There is no showing that she had ever intimated to the Railroad that the method of doing the work was improper, that the quantity of the work was too great for her to perform or that the presence of any other workman on the truck—if there were room for more than one—would have been of assistance to her except to replace her in the doing of the work. * * *"

The foregoing decisions indicate to some extent the conflict which exists among the aforementioned Circuits. These conflicts should be reconciled by this Court.

2. Clearly, the question presented is important for the guidance of the judiciary, both Federal and State, who sit in judgment on cases arising out of the Federal Employers' Liability Act, 45 U. S. C. Section 51 as well as attorneys who prosecute and defend cases under this Act. Ever since this Court's decision in *Lavender v. Kurn*, 327 U. S. 645, any attorney who defends an action under this

Act must, of necessity, revise his concepts of negligence, liability and proximate cause. These concepts, or fundamentals if you will, were well established and clearly defined until the *Lavender* decision. The old "ground rules" have apparently been discarded. This in and of itself is not necessarily bad. However, no new rules have been formulated to replace the old. This Court still insists that negligence is, and remains, the sole basis for recovery under the Federal Employers' Liability Act. Despite this noble pronouncement, jurors are permitted to indulge in fantastic speculation, often times unsupported by any credible evidence in railroad employee cases. It was said by Mr. Justice Black in *Wilkerson v. McCarthy*, 336 U. S. 53, at page 61:

> "Much of respondents' argument here is devoted to the proposition that the Federal Act does not make the railroad an absolute *insurer* against personal injury damages suffered by its employees. That proposition is correct, since the Act imposes liability only for negligent injuries. Cf. Coray v. Southern P. R. Co., 335 U. S. p. 807, ante, 363, 69 S. Ct. 29. But the issue of negligence is one for juries to determine according to their finding of whether an employer's conduct measures up to what a *reasonable and prudent person* would have done under the same circumstances. * * *" (Emphasis added.)

From the foregoing we can only conclude that while the labels remain the same, i.e., negligence, insurer, reasonable and prudent man, they have taken on an entirely new meaning in their application to cases arising under this Act.

In *Stone v. New York, Chicago and St. Louis R. Co.*, 344 U. S. 407, the dissenting opinion of Mr. Justice Frankfurter summarizes our frustrations at p. 410.

"However, the central components of liability for negligence—that it rests upon fault and that appropriate causality must be established between the negligent circumstances and the complained-of injury —are the same for actions under the Federal Employers' Act as for any other negligence actions. For reasons that I for one have long deplored, Congress has seen fit to make such a concept of negligence the basis of compensation for inevitably untoward incidents.

"I deplore this basis of liability because of the injustices and crudities inherent in applying the common law concepts of negligence to railroading. To fit the hazards of railroad employment into the requirements of a negligence action is to employ a wholly inappropriate procedure—a procedure adequate to the simple situations for which it was adapted but brutally unfit for the situations to which the Federal Employers' Liability Act requires that it be put. *The result is a matter of common knowledge. Under the guise of suits for negligence, the distortions of the Act's application have turned it more and more into a workmen's compensation act, but with all the hazards and social undesirabilities of suits for negligence because of the high stakes by way of occasional heavy damages, realized all too often after years of unedifying litigation.*" (Emphasis added.)

We feel that the reasons for review in this case are compelling. The uncertainty presently existing can only be dispelled by decision from this Court. It should either explain the old rules or provide us with new ones.

3. The decision of the court below is believed to be erroneous and the conflicting decisions of *Jackson v. Illinois Northern Ry.*; *Wadiak v. Illinois Central R. Co.*; and *Texas and Pacific Ry. Co. v. Thompson* (*supra*), are correct. These cases have fact situations fundamentally indistinguishable from the instant case. These decisions all

conform to the principles outlined by this Court for the guidance of bench and bar in cases arising under the Federal Act. If the carrier is not an insurer, if negligence remains the sole basis for recovery under this Act then these decisions are correct and the decision of the Trial Court and of the Court of Appeals for the Sixth Circuit in our case are incorrect and erroneous.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWIN KNACHEL,
Counsel for Petitioner.

Of Counsel:

HORNBECK, RITTER & VICTORY,
DONALD E. RYAN,
RICHARD C. OGLINE.

APPENDIX.

OPINION AND ORDER OF THE DISTRICT COURT ON MOTION OF DEFENDANT FOR NEW TRIAL.

MARTIN, *J.*:

Careful consideration has been given to the motion of the defendant railroad carrier to vacate and set aside the verdict of the jury and the judgment of the court thereon and to grant the defendant a new trial.

The arguments and the briefs of the attorneys for both sides and the transcript of the testimony of the plaintiff, and of defendant's eye-witness Dean F. Hackenburg, have been read and analyzed. The authorities cited in the briefs filed by the attorneys for the contending parties have been read and weighed. The conclusion has again been reached, announced at the end of the introduction of the evidence in the case, that the motion of defendant for directed verdict is not well grounded.

Viewing the testimony in the light most favorable to the plaintiff, as a trial court is obliged to do upon a motion for directed verdict, there was substantial evidence upon which the jury could find negligence upon the part of the defendant if it believed testimony of the plaintiff. This testimony was to the effect that the employer failed to furnish an adequate number of carmen helpers to perform the labor required on the date of the accident, with the result that plaintiff and Hackenburg were unduly hustled by the carmen to supply needed lining for the railroad car, —the plaintiff testifying positively that a carman "hollered" or "yelled" at him "to get the stuff." The result was that at the suggestion of Hackenburg, plaintiff said that he lifted, at his end, three bundles of planks, each bundle containing four pieces each of which weighed 18 to 20 pounds.

The plaintiff testified that Hackenburg first picked up his end from the ground and that the plaintiff then picked up the other end and when he lifted the bundles to his shoulder something "clicked" or "cracked" in his back. He said that with Hackenburg he carried the load to the car, when Hackenburg dropped the load from his shoulder and the plaintiff couldn't hold his end any longer and let the planks drop to the ground. He then felt severe pain and was compelled to quit work because he felt sick.

In overruling a motion for a directed verdict at the conclusion of all the evidence the reasons therefor were stated from the Bench and dictated into the record. Several authorities were cited and upon full reconsideration it is believed that the reasons then given were valid,—it would seem unnecessary to repeat the citations then given but to them might be added the following decisions of the Sixth Circuit Court of Appeals:

In *Keith v. Wheeling & Lake Erie Ry. Co.*, 160 F. 2d 654, 658, former Chief Judge Hicks stated:

> "* * * The authority of courts by direction of verdict, to withdraw from the consideration of a jury matter bearing upon the question of defendant's negligence and its proximate relation to the injury is now very restricted indeed."

See also *Hutchins v. Akron, Canton & Youngstown R. Co.*, 162 F. 2d 189, 192; *Massey v. Chattanooga Station Co.*, 210 F. 2d 167 (CCA 6th) 1954, certiorari denied 348 U. S. 896; where the court said:

> "The Supreme Court made it plain in the Tennant case, *supra*, that trial judges are not free to set aside jury verdicts merely because 'judges feel that other results are more reasonable'."

It may not be amiss to state again that the opinion of Judge McVicar in *Whitted v. Aliquippa & Southern R. Co.*

(W. D. Pa.), 112 F. Supp. 599, a case analogous to that at bar, is a well-reasoned decision. The case mainly depended upon by defendant's astute attorney, *Wadiak v. Illinois Central R. Co.* (CA 7th), 208 F. 2d 925, rests upon its own special facts but inasfar as it gainsays, the viewpoint expressed in the opinion is not binding in this Circuit and will not be followed.

In conclusion, the opinion of the Supreme Court in *Stone v. New York, C. & St. L. R. Co.* (1953), 344 U. S. 407, though stronger for the plaintiff on its facts than the case at bar, has binding authoritative value in evincing the proposition that appraisal of the facts should be left to the jury.

Accordingly, the motion of the defendant is overruled and the exception of the defendant to the action of the court is duly noted.

/s/ JOHN D. MARTIN,

Circuit Judge, Sitting by Designation.

September 16, 1955.

JUDGMENT OF THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Entered October 9, 1956.)

This case came on to be heard on the record and briefs and oral argument of counsel;

And it appearing that there is no reversible error in the record:

IT IS ORDERED that the judgment of the District Court be and it hereby is affirmed upon the grounds and for the reasons stated in the opinion and order of the District Court on motion of defendant for new trial.